

Supreme Court, U. S.

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**In the Supreme Court of the United States**

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**No. 75-212**

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**October Term, 1975**

**UNITED STATES OF AMERICA,**

*Petitioner*

**v.**

**THOMAS W. DONOVAN,**

*Et Al.*

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**BRIEF FOR APPELLEE**

**DOMINIC RALPH BUZZACCO**

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## INDEX

	<u>Page</u>
Questions Presented .....	1
Statutes Involved .....	1
Statement .....	2
Summary of Argument .....	3
 <b>Argument:</b>	
I. The statute requires the identification in an application to intercept telephone communications of any person whom the government has probable cause to believe it will overhear participating in conversations about the illegal activities under investigation .....	5
II. The Government is required to make such identification in its applications to intercept telephone communications, or a violation of this statutory obligation will result in the suppression of the evidence derived from said intercept .....	7
Conclusion .....	10

## CITATIONS

## Cases:

<i>United States v. Bellosi</i> , 501 F.2d 833, 837 .....	10
<i>United States v. Bernstein</i> , 509 F.2d 996 .....	7
<i>United States v. Chavez</i> , 416 U.S. 562 .....	9
<i>United States v. Giordano</i> , 416 U.S. 505 .....	5, 8, 9
<i>United States v. Kahn</i> , 415 U.S. 155 .....	4, 7
<i>United States v. United States District Court</i> , 407 U.S. 297, 302, 92 S. Ct. 2125, 32 L.Ed. 2d 752 (1972) .....	10

	<u>Page</u>
Constitution, statutes and rule:	
18 U.S.C., Section 1955 .....	4, 6
18 U.S.C. 2510(11) .....	5
18 U.S.C. 2516(1) .....	10
18 U.S.C. 2518(1) .....	10
18 U.S.C. 2518 (1) (b) (iv) .....	1, 3, 5, 6, 7
18 U.S.C. 2518 (4) (a) .....	3, 5, 6, 7
18 U.S.C. 2518(8)(d) .....	2
18 U.S.C. 2518 (10) (a) .....	7, 8
18 U.S.C. 2518 (10) (a) (i) .....	5, 8

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**BRIEF FOR APPELLEE**  
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### QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2518(1)(b)(iv) requires the identification in an Application to Intercept Telephone Communications of any person whom the Government has probable cause to believe it will overhear participating in conversations about the illegal activities under investigation.

2. Whether, if the Government is required to make such identification in its Applications to Intercept Telephone Communications, a violation of this statutory obligation will result in the suppression of the evidence derived from said intercept.

### STATUTES INVOLVED

The relevant Statutory Provisions are set out in the Appendix to the Brief For The United States.

## STATEMENT

Appellee generally agrees with the Statement of the Case as contained in the Petitioner's Brief. The five Defendants involved in this case can be separated into two distinct groups on the basis of the issues involved. This Appellee, Dominic Ralph Buzzacco, and Thomas W. Donovan and Vanis Ray Robbins occupy a similar position in terms of the question of identification in the Wiretap Application which was requested by the Government in connection with their investigation of a gambling operation in the Northern District of Ohio. Jacob Joseph Lauer and Joseph Francis Merlo are united in terms of the issue of the subsequent Notice of Inventory which was called for by Title III, Section 18 U.S.C. 2518(8)(d).

Judge Krupansky, of The U. S. District Court For The Northern District of Ohio conducted extensive evidentiary hearings upon the Motion of all the Defendants For Suppression of Evidence obtained in connection with the authorized interceptions of communications involving an illegal gambling business in said district. As a result of said hearings Judge Krupansky found, amongst other things, that the Appellee, Dominic Ralph Buzzacco was not only known to the Government to have been engaged in bookmaking operations in the past and to be involved in this investigation, but also knew that his conversations relating to illegal gambling operations would be intercepted prior to its Application For a Continuance of a Wiretap situation made on December 26, 1972 (Appendix D, Pages 55(a) through 57(a) of Petitioner's Motion For Writ of Certiorari). The Court of Appeals For The Sixth Circuit reviewed Judge Krupansky's factual determination and unqualifiedly concurred in his findings (Appendix A, Pages 10 (a) through 13 (a) of Petitioner's Motion For Writ of Certiorari).

The Petitioner does not take serious issue with this finding in its Brief. The three Defendants, and Appellees herein (i.e., Donovan, Robbins and Buzzacco), are treated in exactly the same light in connection with the Government's Brief.

## SUMMARY OF ARGUMENT

1. Sections 2518(1)(b)(iv) and 2518(4)(a) require that the Application for an Order Authorizing a Wire Interception identify "the person, if known, committing the offense and whose communications are to be intercepted." It is submitted that these provisions are very clear in requiring that the Government name any such person whose conversations the Government has probable cause to believe will be intercepted in connection with said surveillance so long as the conversations deal with the illegal subject matter of the investigation. The authority to intercept communications by use of a wiretap is in general derogation of the existing prohibition against such interceptions by any person, or organization, including the United States Government. Therefore, the Statutory allowance for such interceptions must be viewed and interpreted as imposing strict restraints upon this expansive search and intrusion of the privacy. The object of a wire interception is not simply to invade the privacy and conduct a search of the conversations of the so-called primary target but is also designed to have a similar effect upon others who by necessity would be engaging in similar conversations with said primary target.

In this situation the Government would not have been subjected to a long, time-consuming and detailed investigation to determine the identity of parties to be included in the Application For The Continuation of The Wire Interception. They either knew the identity of the Defendants, Donovan, Robbins and Buzzacco, or could very



easily have determined said identity. To require only the naming of the target of investigation ignores the fact that the very nature of a wire interception by necessity includes at least two parties to constitute a conversation (Also, the fact that an integral element of the crime being investigated, i.e., Title 18, Section 1955, requires the involvement of five or more "primary targets". Emphasis this point.)

This Honorable Court in the case of *United States v. Kahn*, 415 U.S. 155 established that Title III required the naming of a person in the Application or Interception Order when law enforcement authorities had probable cause to believe that the individual was committing the offense for which the wiretap was sought. This was established by the Court in its determination that the Defendant in that action should not prevail in her Motion For Suppression due to the fact that the Government did not have probable cause to believe that her conversations would be intercepted in connection with her complicity, or involvement in a gambling business which was under investigation. One cannot help but read the *Kahn* Decision as saying that had the Government realized Minnie Kahn probably was engaged in the gambling operation and that her conversations would have been intercepted, they would have been required to make this fact known to the District Judge when the Wiretap Order Application was submitted for approval.

2. Recognizing the Statutory obligation to name those individuals which the Government has probable cause to believe will be intercepted and has further probable cause to believe are engaged in the illegal activity under investigation, the failure to perform this Statutory duty should result in a suppression of any evidence obtained as it would relate to those specific individuals failed to be mentioned. Any aggrieved person may move to suppress the contents

of intercepted communications, or evidence, if the communication was unlawfully intercepted according to 2518(10)(a)(i). Furthermore, an aggrieved person is defined in 18 U.S.C. 2510(11) as follows:

"'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

The Appellees, Donovan, Robbins and Buzzacco, certainly qualify as aggrieved persons and have standing to question and move for the suppression of the evidence which was obtained against them in connection with the Continuation of the Wiretap by the December 26, 1972 Application.

This Honorable Court in the case of *United States v. Giordano*, 416 U.S. 505 established that suppression is the proper remedy in connection with certain Statutory violations. The failure to name Buzzacco and the other Appellees in the Application of December 26, 1972 was a Statutory violation which unlike the Inventory Notice situation did not come after the fact of the interception but preceded said invasion of privacy. As such, it is one of the Statutory violations referred to in the *Giordano* Court as requiring suppression.

## ARGUMENT

### I

**The Statute Requires the Identification in an Application to Intercept Telephone Communications of Any Person Whom the Government Has Probable Cause to Believe It Will Overhear Participating in Conversations About the Illegal Activities Under Investigation.**

The Government repeatedly took great pains in its Brief to suggest that Section 2518(1)(b)(iv) and 2518(4)(a) are directed to the so-called "target" of the au-

thorized wiretap. It is their contention that only the "principal target" of the interception must be identified and that Congress was focusing its efforts to require detailed and complete descriptions in connection with the telephone to be intercepted more so than the parties' conversations that would be overheard.

There is no question but that the Government sought the authority to intercept the wire communications of certain individuals to facilitate their investigation of gambling operations in the Northern District of Ohio. The primary violation that was under investigation was that of Title 18 U.S.C. Section 1955. Said Section requires that five or more individuals engage in the operation of an illegal gambling business. In connection with such an investigation it would seem that the Government must be looking to establish at least five "principal targets" of the interception that they were seeking. There is no question that as the interception began and more facts and identities were learned that until the renewal was sought any information gained would have been admissible and proper. However, on December 26, 1972, the Government was aware of certain relevant and incriminating facts including the identities of Donovan, Robbins and Buzzacco and the fact that they were involved in conversations relating to the gambling business under investigation. At this point they had become possible "principal targets". They were not only principal targets for the anticipated continuation of the wiretap but they were also principal targets for the subsequent indictments which were to follow.

A clear and unstrained reading of Sections 2518(1)(b)(iv) and 2518(4)(a) dictate that a Statutory obligation is placed upon the Government when seeking authority to intercept communications to name the individuals committing offenses which are the subject matter of the investi-

gation for which the wiretaps are sought. This Honorable Court in *United States v. Kahn*, 415 U.S. 143, 155 (1974), stated that:

"Title III requires the naming of a person in the Application, or Interception Order, only when the law enforcement authorities have probable cause to believe that that individual is committing the offense for which the wiretap is sought."

One cannot read the *Kahn* Decision without inescapably arriving at the conclusion that the Court is also saying that Title III definitely requires the naming of a person in an Application or Interception Order when law enforcement authorities have probable cause to believe that the individual is committing the offense for which the wiretap is sought. This interpretation of *Kahn* and Sections 2518(1)(b)(iv) and 2518(4)(a) was applied by the Sixth Circuit below and the Fourth Circuit in the case of *United States v. Bernstein*, 509 F.2d 996. Footnote No. 8 on Pages 8 and 9 of the Petitioner's Brief discusses other authorities who have likewise followed the *Bernstein* ruling.

## II

**The Government Is Required to Make Such Identification in Its Applications to Intercept Telephone Communications, or a Violation of This Statutory Obligation Will Result in the Suppression of the Evidence Derived from Said Intercept.**

Assuming that the Government did violate a Statutory duty to name and identify Donovan, Robbins and Buzzacco in its December 26, 1972 Application, then suppression would be the only remedy that would guarantee adherence to the congressionally established safeguards built into Title III. Suppression of Evidence derived from Wire Interceptions is governed by 18 U.S.C., Section 2518(10)(a). We would agree with the Government that the Statutory basis for the Appellees' request for Suppression is to

be found in sub-paragraph (i) which refers to Unlawfully Intercepted Communications.

This Honorable Court has ruled in the case of *United States v. Giordano*, 416 U.S. 505 that some Statutory violations of Title III would come under sub-paragraph (i) of Section 2518(10)(a) and would result in Suppression of Evidence obtained as a result of this unlawful interception:

"But it does not necessarily follow, and we cannot believe, that no statutory infringements whatsoever are also unlawful interceptions within the meaning of paragraph (i) (1) the words 'unlawfully intercepted' are themselves not limited to constitutional violations and we think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device (page 527)."

The Statutory violation involving the Appellees, Donovan, Robbins and Buzzacco, must be viewed in a far different light than the Notice violations involving Merlo and Lauer. Unlike a Notice or Inventory situation which is after the fact, the naming requirement and identification mandated by Congress is designed to provide the judicial officer with relevant and important information relating to individuals who are to become the subject matter of a wire interception. This did not take on the aspect of a ministerial task and cannot be equated with the return of an Inventory in a typical search warrant situation or a typographical error in the naming of the party authorizing a wiretap.

Each Application For a Wiretap, whether it be an Application For a Continuation of an Existing Tap, or the Application For The Original Tap, must abide by the Statutory regulations contained in Title III. There can be no doubt but that Donovan, Robbins and Buzzacco were

principal targets in the investigation being conducted by the Government by the time they approached the Federal Court on December 26, 1972, with their Applications seeking a Continuation and Extension of an Existing Tap. The failure of the Government to name these individuals in said Application was a failure to satisfy a Statutory requirement to provide safeguards to the citizenry in connection with the use of this pervasive means of invading one's privacy.

One might reasonably argue that the Statutory violation contained in *United States v. Giordano*, Supra was more of a ministerial violation than that contained in this matter before the Court. The *Giordano* Application was submitted to the Court of the District in question which contained adequate probable cause. All of the other details and regulations and rules had been abided by and the procedures appeared faultless. Yet the Court found that the delegation of the actual granting of approval to utilize a wiretap to somebody other than one of those specifically designated by Statute to have such authority was not only a Statutory violation but one which required suppression. In this case, the Government failed to include Donovan, Robbins and Buzzacco in their Application thereby committing a substantive violation of the Statutory regulations.

Accepting this Court's Decision in the case of *United States v. Chavez*, et al, 416 U.S. 562 to the effect that not all Statutory violations, no matter how insignificant, will result in Suppression of Evidence, one cannot help but recognize the glaring difference between the factual situation of *Chavez* and the Statutory violation involving Donovan, Robbins and Buzzacco. Notwithstanding the fact that the Court did not mandate suppression under the circumstances of *Chavez*, it did say at Page 580:

"Though we deem this result to be the correct one under the Suppression Provisions of Title III, we also deem it appropriate to suggest that strict adherence



by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed on it when authority to engage in wiretapping, or electronic surveillance, is sought."

The D.C. Circuit succinctly stated the reasons justifying suppression in a situation such as this in the case of *United States v. Bellosi*, 501 F.2d 833, 837:

"By asking us to refashion another clearly worded provision in Title III in a way that would somewhat ease another of the 'stringent conditions' with which a law enforcement agency must comply before conducting an interception, the Government effectively asks us to do what the *Giordano* Court would not. Section 2518(1) is no less important than 2516(1) to Congress' legislative scheme to allow only limited governmental interception of wire or oral communications. Section 2518(1) provides that the judge from whom interception authorization is sought be provided with a detailed and particularized application containing that information which Congress thought necessary to judicial consideration of whether the proposed intrusion on privacy is justified by important crime control needs. See *United States v. United States District Court*, 407 U.S. 297, 302, 92 S. Ct. 2125, 32 L.Ed. 2d 752 (1972)."

### CONCLUSION

For the above stated reasons, the Judgment of the Court of Appeals should be sustained.

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